"What has to be asked and answered in this case is how could they (i.e. profits) be 'capitalised' in accordance with these Acts (i.e. the Companies Acts), without either leaving the holder of the new shares liable to pay them up with new money or sharing out the profits to the allottees, whether in cash or in account, so that the share-out of the money should be used to pay up the shares. To my mind there was either a payment to the shareholder of the nominal amount of the shares or the company paid up the shares itself and gave them away for nothing."

Suffice it to say that Lord Sumner's view was not accepted by the majority of the Lords of Appeal in the House of Lords. The contention of counsel for the respondent must, therefore, be rejected.

The next contention of the respondent is that there was nothing to bind the shareholders to take the shares which might be allotted to them by the directors. It is said that the resolution of the 23rd December, 1954, declared a dividend for credit to the account of shareholders "to pay off any amount any of them may owe to the Company and also to pay for the value of the shares which the directors are contemplating issuing to them in the near future." It is said that these words imply a pious hope that the shareholders to whom shares might be allotted would take the shares. These words, in my opinion, express the determination of the company that the money was not to be paid to the shareholders nor placed at their disposal but to be applied as stated in the resolution. Under the circumstances, the shareholders had no option to receive cash in lieu of shares.

It is further contended by counsel for the respondent that upon the declaration of the dividend by the resolution of the 23rd December, 1954, the sum due for dividend became a debt due from the company to the respondent and that the respondent could sue the company for the dividend. In my opinion, the resolution did not give to the respondent a right to sue for the dividend in cash, his only right being to have the dividend credited to his account and applied as stated in the resolution.

Lastly it is contended on behalf of the respondent that upon the declaration of the dividend it accrued as income under section 10 of the Income Tax Ordinance. Here it is necessary to refer to a case which was not cited by either counsel and in which the meaning of the words "income arising or accruing" was considered by the Judicial Committee of the Privy Council. The case is *St. Lucia Usines and Estates Company Ltd.* v. *Colonial Treasurer of St. Lucia.*[2] The facts in that case were these. In 1920 the appellants sold all their property in St. Lucia and ceased to reside or carry on business there. In 1921 interest upon the unpaid part of the purchase price was payable to them but it was not paid. The appellants were liable to pay income tax for the year 1921 under the Income Tax Ordinance, 1910, of St. Lucia, only if the interest above mentioned was income arising or accruing to them in 1921. It was held by the Judicial Committee that though the interest was a debt accruing in 1921 it was not income arising or accruing in 1921, and that the appellants were not liable under the Ordinance to pay tax for that year. In the judgment of their Lordships which was delivered by Lord Wrenbury it was said:

"The respondent contends that the above interest 'accrued' to the company in the year 1921, because it was payable in that year and none the less because it was not paid in that year. Their Lordships do not agree. The words 'income arising or accruing' are not equivalent to the words 'Debts arising or accruing'. To give them that meaning is to ignore the word 'income'. The words mean 'money arising or accruing by way of income'. There must be a coming in to satisfy the word 'income'."

It follows from the above case that a dividend is not to be treated as income accruing in the Colony merely because it has accrued as a dividend. The money must accrue as income. In my opinion the dividend in question did not accrue by way of income in view of the terms under which it was credited to the respondent's account.

In the result, I accept the contentions of counsel for the appellant and hold that the dividend of $20,000 was not the respondent's income within the meaning of section 10 of the Income Tax Ordinance. I would therefore allow the appeal with costs here and in the Court below.

Appeal allowed.

Solicitors: *Drew & Napier.*

KATHI-RASEN v. KATHI-RASEN

[O. C. J. (Rigby J.) January 25, 1960]

[Penang — Divorce Petition No. 6 of 1958]

Divorce — Proceedings — Delay not necessarily fatal — Adultery — Public policy — Discretion of Court.

This was a husband's undefended petition for divorce on the ground of his wife's desertion. The respondent left her husband exactly one month after their marriage on March 22, 1941. She was never heard of until the petitioner saw her by chance with another man and 2 children in Butterworth in 1948, on which evidence he asked for a decree nisi.

The petitioner also filed a discretion statement which revealed that from 1944 to 1948 he had lived with another woman, and after which period another one, by whom he had a son and whom he was anxious to marry.

Held: despite the delay in presenting the petition, and the petitioner's adultery, the Court is entitled to exercise its discretion in favour of the petitioner by the grant of a decree nisi:

The duty of the Court is to maintain a delicate balance between the need for the sanctity of marriage and those considerations which make it contrary to public policy to insist on the maintenance of marriage which has in fact ceased to exist. Although a child born in adultery cannot be legitimated by the subsequent marriage of his parents, some advantage does accrue to him from the fact that his parents are married. As the petitioner's marriage in this case is irretrievably broken, in all the circumstances, it is in the interests of all parties concerned — and not against public policy — to enable the regularization by marriage these irregular relationships.

DIVORCE PETITION.

Lim Kean Siew for the petitioner.

Respondent absent.

L. A. Massie (Sr. Federal Counsel) for the Attorney-General.

Rigby J. delivering oral Judgment: This is a husband's undefended petition for divorce on the ground of the wife's desertion. The facts are as follows.

The parties were married in Penang on the 22nd March, 1941, and lived in Penang after their marriage. Both the petitioner and the respondent are of the Tamil race. According to the petitioner, on the 22nd April, exactly a month after their marriage, his wife told him that she was going out. She went out and never returned to the house again. He said that he made inquiries about her, but without success. He said that there had been no quarrel between them and he could not offer any explanation for her remarkable disappearance. In December, 1941, the War in the Far East broke out. The petitioner said that after the War he again made inquiries about his wife, but without success. He admitted that he did not advertise in the papers, nor did he make any inquiries from the Police. Indeed, he admitted perfectly frankly — and it was difficult for him to say anything otherwise — that he was not really anxious to find her. According to his evidence, he heard unconfirmed rumours that she was living with another man and had been seen both in Singapore and again in Kelantan. He did not know who the man was, nor was he apparently interested in any way in making inquiries. According to his evidence, in 1948, purely by chance he saw her walking down the road in Butterworth in the company of two children and another man. On inquiry, he found that the man was a Tamil Police Inspector with whom she was living. He asks me to believe that from the day she walked out of his house in 1941 until the day he saw her walking down the street at Butterworth in 1948 he never set eyes on her and knew nothing as to her whereabouts or as to the manner in which she was living. On that evidence he asked for a decree nisi. That is one side of the picture.

The petitioner has very properly filed a discretion statement in this case. From that statement it is apparent that in December, 1944, during the War years, he met another woman, with whom he lived and by whom he had two children, whom he is now maintaining. In October, 1948, he met another woman, with whom he lived and by whom he has a son, aged 10. He has continued to live with her since that date and says that he is now anxious to marry her.

Accepting for a moment as true the petitioner's story that a month after his marriage his wife walked out of the house without any reason or explanation, I find it extremely difficult to believe his evidence that he knew nothing of her whereabouts or manner of living until he saw her walking down the street with the Tamil Police Inspector and the two children some time in 1948.

I have found the case an extremely difficult one and adjourned the original hearing in order that I might have the assistance of the Attorney-General. Mr. Massie, Senior Federal Counsel, who appeared for the Attorney-General at the resumed hearing today, informed me that the Police Inspector, with whom the respondent was admittedly and undeniably living, had been residing in Penang since 1945, with the exception of one year when he served in Butterworth, and that the respondent has borne the Police Inspector 12 children, of whom 11 are still alive. Mr. Lim Kean Siew, for the petitioner, accepted those facts as proved, but said that the petitioner had no knowledge of them. Indeed, it is, of course, the petitioner's case that he knew nothing as to the whereabouts of his wife, nor with whom or how she was living until he met her by chance in Butterworth in 1948.

The petitioner resides in Taiping. I repeat, I find his evidence extremely difficult to believe, and I find it impossible to believe that he did not know perfectly well that his wife was living with this Police Inspector, and that he had known that for a very considerable period of time before he instituted these proceedings. Unreasonable delay in the presentation of a petition is a statutory bar to its success, unless the Court considers there is some reasonable explanation for that delay.

A further difficulty with which the petitioner is faced is the matter of his own admitted adultery. I have found the case an extremely difficult one. In cases of this kind the Court has to have regard to the interests of the community as a whole and to maintain the delicate balance between the need for the sanctity of marriage and those considerations which make it contrary to public policy to insist on the maintenance of a marriage which has, in fact, though not in law, ceased to exist. Under the law as it now stands a child born in adultery cannot be legitimated by the subsequent marriage of the parents. It may be that the Legislature may give consideration to an amendment of this law as has, indeed, been done in England. But I have come to the conclusion, albeit with considerable doubt, that even allowing for what I deem to be the unreasonable delay of the petitioner in the presentation of these proceedings, I ought to exercise my discretion in this case in his favour. Whilst appreciating that under the law as it now stands the 10 year old son cannot be legitimated by subsequent marriage, I cannot help thinking that it would certainly be of some advantage to him if his mother and the petitioner, whom he probably regards as his lawful father, should be married. I was informed by Mr. Lim Kean Siew, who appears for the petitioner, that the petitioner and the woman with whom he lives, have been living in Taiping for the last 10 years as Mr. and Mrs. Kathi-Rasen and that she is known and accepted by the

community under that name. It is manifest that the petitioner's own marriage is irretrievably broken and that there can be not the slightest possibility of the parties to that marriage ever coming together again. In those circumstances, it seems to me to be in the interests of all parties concerned — and not contrary to the interests of public policy — that I should grant a decree nisi which will enable the parties — even at this late stage — to regularise by marriage the irregular relationships which have been subsisting for many years past.

In those circumstances and, as I have said, with considerable doubt as to whether I ought to do so, I propose to exercise my discretion in the petitioner's favour and to grant the decree nisi in this case.

Decree nisi granted.

KUPPU v. BROWN & ANOR.

[C. A. (Hill Ag. C.J., Good and Ong JJ.) July 21, 1959]

[Penang — F.M. Civil Appeal No. 5 of 1959]

Landlord and tenant — Licensee or tenant — Control of Rent Ordinance, 1956 — "Intention" of owner — House built upon land — Whether creates any interest in land — Declaration — Mandatory order for possession.

The appellant in this case contended that by virtue of the building of a house upon the land by his predecessor he had acquired rights as a tenant and was protected from eviction under the Control of Rent Ordinance. Secondly, there was no proper notice terminating the tenancy.

The respondents contended that there was no intention on their part to create a tenancy or to give the occupier anything more than a bare license revocable at will. To ensure that the occupants of the land would not acquire prescriptive title by way of possession an annual fee varying from $2 to $3 was demanded.

Held (Hill Ag. C.J. and Good J., Ong J. dissenting): (1) the question whether a person is a tenant or a licensee is a question depending upon the intention of the parties and the law does not impute intention to enter into legal relationships when the circumstances and conduct of the parties negative any such intention;

(2) the expression 'annual rental' contained in the 'Conditions' printed on the back of the "Temporary Occupation Licence, Dwelling-House", did not estop the owners from offering the explanation that although described as "rental" the payment was in effect a licence fee.

Per Ong J. (dissenting): on evidence presented by the plaintiffs (respondent in the case) and accepted, the plaintiffs have not discharged the onus on them of proving that the defendant was on the land as a licensee, whose license was removable in the manner it was purported to have been terminated.

Cases referred to:—

(1) *Booker* v. *Palmer* [1942] 2 All E.R. 674.

(2) *Errington* v. *Errington* [1952] 1 All E.R. 149, 155.

(3) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370.

(4) *Montgomerie & Co. Ltd.* v. *Wallace-Jones* [1904] A.C. 73, 75.

(5) *Lee* v. *Lancashire Yorkshire Railway Company* (1871) L.R. 6 Ch. App. 584, 535.

(6) *Huckle* v. *London County Council* (1910), 26 T.L.R. 580.

(7) *Oliver* v. *Nautilus Steam Shipping Co.* [1903] 2 K.B. 639, 648.

(8) *Addiscombe Gardens Ltd.* v. *Crabbe* [1957] 3 All E.R. 513, 571.

(9) *Robins* v. *National Trust Co. Ltd.* [1927] A.C. 515, 520.

COURT OF APPEAL.

Ong Huck Lim for the appellant.

L. E. Osman for the respondent.

Hill Ag. C.J.: The issue before the learned trial Judge was whether the appellant was a licensee or a tenant of the respondents who have prayed for a declaration that appellant's right to use their land had been determined and for a mandatory order for possession.

The appellant's case was that he was a lawful tenant of the land paying an annual ground rent of $2 per annum and that he was protected from eviction under the Control of Rent Ordinance. The respondents' case was that the appellant had no more than a licence to occupy the land and that such licence had been duly determined.

On the facts and on the law the learned trial Judge was wholly satisfied that the appellant was merely a licensee and that his licence had been duly determined. He accordingly gave judgment for the respondents as prayed. From this judgment the appellant appealed.

The facts of the case are really quite simple. There are about 1,000 houses, including the appellant's, built on Glugor Estate, the property of the respondents. The occupiers of these houses pay $2 or $3 annually in respect of the land occupied by each house. This custom has been apparently in existence for 20 years or more and precedes the Japanese occupation.

It was during the occupation that the appellant purchased a house and cowshed from the previous owner and went into occupation.

The second respondent Hugh Reginald Watts described in general terms the practice of the estate. It would appear that there was no express agreement between the appellant and the respondents, at any rate none was shown to have been made.

Indeed, when the appellant went into occupation the respondents were not in the country.

Bearing in mind that Mr. Watt's evidence was accepted by Rigby J. to the effect that from before the war occupation of the estate land was by licence, it seems tenable that when appellant purchased the erections and went into occupation he was in fact a mere trespasser if, as appears to have been the case, the previous owner was a licensee. Subsequently his position seems to have been regularised by his being accepted as a licensed occupier.

Mr. Watts stated that he had worked on this estate for the last 25 years. The appellant's house was in a coconut estate belonging to the respondents. Mr. Watts said that the practice was to give a licence for a year to persons not working on the estate to come on to the estate